In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1086

C. ELLIS HENICAN
AND
PHILIP E. JAMES
Applicants

versus

EXCHANGE NATIONAL BANK OF CHICAGO
Respondent

OPPOSITION TO APPLICANTS' APPLICATION FOR WRIT OF CERTIORARI

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AUTHORITIES

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Respondent, EXCHANGE NATIONAL BANK OF CHICAGO prays that Petitioners' Application For Writ of Certiorari to review the Judgment of the Supreme Court of Louisiana of March 31, 1975, and the Judgment on Rehearing entered on November 3, 1975, be refused and denied.

OPINIONS

The opinions appealed from are attached to Applicant's Brief Appendix B at page 1B through 17B and are not repeated herein.

JURISDICTION

Appellants have attempted to invoke jurisdiction under 28 U.S.C. 1257 (3) which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

". . .(3) by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or *where the validity of a State statute is drawn in question on the ground of it being repugnant to the constitution*, treaties, or laws of the United States or where any title, right, privilege or immunity is specifically set up to claim under the constitution, treaties, or statutes of commisssion held or authority exercised under the United States." " [Emphasis added]

It would appear from the outset that Applicants' reliance upon this statute for jurisdiction would not be satisfactory to permit review by this Honorable Court for the following reasons:

There is no issue relative to the invalidity or the inability of the United States District Court sitting as a reorganization tribunal to order a sale of the corporation debtor's property upon any terms, conditions and circumstances of the Court's discretion nor did that issue arise in any Louisiana Court. In the case at bar the cause of action was for recovery under a separate continuing guaranty 18 months prior to any sale of the debtor corporation's property in relation to the debt. As a matter of fact, Applicants throughout the case and as late as their application for Rehearing in the Louisiana Supreme Court admitted there was no Federal question relative to the sale:

"(i). False Conflict. The case before the Court (La. Supreme Court) involved, at most, a "false conflict". No one has attacked and no one can attack the sale of the property by

the Federal Court. There is no effect on the bankruptcy case or on the reorganization proceedings, whatever this Court holds. There is no reason to find a conflict between the two jurisdictions where none is necessary. This has been recognized by all Federal Courts considering problems of this kind."

APPLICATION FOR REHEARING TO LOUISIANA SUPREME COURT ON BEHALF OF C. ELLIS HENICAN AND PHILIP E. JAMES
Page 6.

Applicants have sought under the Louisiana Court system an interpretation of the Louisiana Deficiency Judgment Statute which would bar the separate debt in the separate State Court lawsuit.

The Louisiana Court has upheld its own statute and interpreted it as not relating to, or being applicable to sales under Chapter X of the Bankruptcy Statute.

The upholding of Applicants' choice of statute to invoke jurisdiction could only be successful if Applicant were advocating the unconstitutionality of the Louisiana Statute. In the present case if he were successful in so having the Louisiana Deficiency Judgment Statute declared unconstitutional, a prerequisite under the jurisdiction of 28 U.S.C. 1257 (3), there would be no valid grounds to impede the progress of Respondent's proceeding on the separate guaranty. Applicants have clearly admitted there is no Federal question as to the sale in bankruptcy.

It would, therefore, seem that by this jurisdictional reference alone Applicants have sequarely placed themselves on the horns of a dilemma.

If the statute is declared unconstitutional, Respondent's rights are unrestricted and unhampered; on the other hand, if there is no question as to unconstitutionality, there is not adequate jurisdictional grounds before this Court on this statute invoked. (28 U.S.C.# 1257 [3]).

In either event Applicants' own evaluation and admission indicate that there is no Federal issue in this case and the Louisiana Supreme Court on both occasions has interpreted its own Statute as being inapplicable to the Federal question.

QUESTIONS PRESENTED BY APPLICANT

1. Whether a state's Deficiency Judgment Act is in conflict with the provisions of Chapter X of the Federal Bankruptcy Act.

2. Whether or not Article VI of the United States Constitution prevents the application of a state's Deficiency Judgment Act to an obligation, involving a principal debtor which is under the jurisdiction of the Federal Bankruptcy Court pursuant to Chapter X of the Federal Bankruptcy Act.

3. Whether the Federal Bankruptcy Act permits application of the laws of the various states, which laws are not in conflict with the purposes and policy of the Federal Bankruptcy Act.

RESPONSE TO THE QUESTIONS PRESENTED

1. In examining the statute relied upon so heavily by

Applicants, it is evident to see that it was never addressed to the question presented by Applicants:

> R.S 13: § 4106. Deficiency judgment prohibited if sale made without appraisement
>
> If a mortgagee or other creditor *takes advantage of a waiver of appraisement of his property*, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor. The mortgagee or other creditor shall not have a right thereafter to proceed against the debtor or any of his other property for such deficiency, except as provided in the next paragraph.
>
> If a mortgage or pledge affects two or more properties, movable, immovable, or both, the judicial sale of any property so affected without appraisement shall not prevent the enforcement of the mortgage or pledge in rem against any other property affected thereby. As amended Acts 1952, No. 20, § 1; Acts 1960, No. 32, §1. [Emphasis Added]

It is obvious that the first controlling provision relates to the mortgage creditor taking advantage of the "waiver of appraisement".

In the case at bar the Federal Judge set the terms and condition *and* ORDERED AN APPRAISAL though he clearly was not obligated to so do.

The other obvious if more subtle description of the transaction is that whatever proceeds were to be derived from this sale would not have been for the benefit of, nor would they have gone to, the creditor. They did go to benefit the Debtor's estate and regardless of how much had been realized from the Marshall's sale of the property it would only have gone to defray the Trustee's expenses and the balance was devoted to the Debtor's general estate. As a matter of fact the creditor's position would have only diminished because he would then be an ordinary general creditor for his debt once his specific security was sold.

2. Applicants second question seems to address itself to the constitutionality of the Louisiana Deficiency Judgment Statute and if this question was before this Court and answered in the negative Applicants' position would be defeated entirely; on the other hand, if this Court were to hold the Statute as constitutional the interpretation by the Louisiana Supreme Court and by Applicants' numerous statements in brief previously quoted would indicate no conflict with the Federal question.

3. Applicants' third question would seem not to be proper before this Court as the Louisiana Supreme Court has held on both occasions that the Statute does not conflict with the sales under Chapter X.

If this Court were to hold otherwise, it would indicate the intention to engraft separate terms and conditions for sales in each jurisdiction and the basic premise of all Federal law, uniformity, would be ill served. One could envision the same creditor losing rights under separate contractural guarantees in each of many separate jurisdictions and each one for reasons beyond his control but exclusively determined by the discretion of the reorganization tribunal.

This conclusion would certainly seem to tear the consistant framework of the Bankruptcy laws and create undue havoc and chaos where these last 45 years the Reorganization Statute has attempted to unify results in each jurisdiction.

STATEMENT

This case is the culmination of a ten year struggle in a separate suit on a continuing guaranty which was executed by the two senior partners of a well established law firm, which firm is the attorney of record for Applicants.

There is no question that the guaranties were scrupulously examined, deeply evaluated, and executed after due care.

The guaranty is attached hereto as Appendix "A".

The guaranty was given to induce Respondent and its New Orleans lead bank to lend money to a corporation for the improvements of property located in the New Orleans French Quarter.

Thus a sum in excess of $1,000,000.00 was advanced for the improvements of the property on February 21, 1966, -- not one penny was ever spent on the project for any purpose or for the purposes for which the loan was granted, and after these ten (10) years not one penny has ever been repaid on the loan by either the corporation or the Applicants. As a matter of fact, four months after the mortgage and guaranty were signed, Applicants who were officers and directors of the Debtor corporation prepared a secret counter letter transferring the property surreptitiously in obvious violation of the mortgage, the counter letter was recorded in

Orleans Parish in Conveyance Office Book 678-A in September, 1966, and these facts were not revealed for two years after the reorganization proceedings were filed.

The guaranties, the subject of this litigation, were separate agreements in which the Applicants were solidary co-debtors with the corporation, and during the pendency of the corporate reorganization, this separate suit was commenced on May 31, 1968, in State Court prior to any sale by the Trustee of the corporate Debtor's property.

Though there were many grounds for default no foreclosure suit was filed and in fact the stay order has been in effect for nine years.

Applicants argued many motions attempting to stay the Court action, citing as a reason, the separate corporate reorganization proceedings in Federal Court.

On September 18, 1968, the Trustee petitioned the Court that the property was not necessary for the successful reorganization and was a huge current financial drain of the Debtor estate. The property had become run down, dilapidated, and only served to house wandering vagrant trespassers in the French Quarter of New Orleans; it was condemned by the City as a hazard to the general health and welfare of the public.

Pursuant to this the Trustee petitioned the Court to sell the property at Marshall's sale to prevent further drain on the dwindling financial situation of the corporation.

After the Trustee's request for sale of the property was first heard by the Bankruptcy Referee sitting as a Special Master thirteen (13) months elapsed with no action taken as

the helplessness of the reorganization became more and more evident.

Finally, the Respondent joined in the petition for the Court to amend the Trustee's petition to require an appraisal and that at least 75% of that appraised value be a minimum acceptable bid. It was also requested that the secured creditors be permitted to bid up to the value of their mortgage, all of which conditions were consistent with the accepted Bankruptcy practice, particularly for sales under Chapter X.

> [Although this was the Trustee's original request for sale and not a foreclosure the conditions recommended exceeded those which would have been necessary under the Louisiana Deficiency Judgment Statute requiring only two-thirds of the appraised value be bid in order for a deficiency judgment to be later obtained.]

It should be observed that at the time of the sale of the property the suit for recovery on the continuing guaranty had been in State Court for over two years.

Applicants herein were cited to the Referee's hearing and chose not to attend and in fact despite multiple notices never appeared in the reorganization at all and made no attempts to protect their interests by bidding on the property which was later sold.

The Referee's recommendation was presented to the United States District Judge and upon a hearing after due notice the acceptance of the Referee's recommendation was affirmed.

No opposition to the recommendation was received and the Court set notices of a Hearing to order the Trustee's request for Marshall's sale of the property.

Again, no opposition was received and the Court ordered the Marshall to sell the property on the conditions recommended by the Special Master.

At the Marshall's sale the successful bid was an amount which represented 76.45% of the appraised value set by the United States District Court-ordered appraiser who in fact had been the original appraiser for the Debtor Corporation when it originally obtained the loan from Respondent.

The amount of the successful bid exceeded the 75% ordered and far exceeded the 66 2/3% which would have been required by the Louisiana Deficiency Judgment Statute.

Respondent amended its petition for recovery on the special continuing guaranty to permit a dollar offset against the debt of the actual amount recovered by the Debtor's estate, and have continued Respondent's suit for recovery.

Applicants attempted to defeat the State Court's recovery on the grounds that the Louisiana Deficiency Judgment Statute R. S. 13:4106 [See Applicants' Brief pages 2A and 3A] had not been complied with in the sale of the Debtor corporation's assets and hence recovery against the separate continuing guarantors was released.

At first their position was that there was no appraisal ordered by and submitted to the United States District Court although the appraisal was delivered to the Federal Judge one month prior to the Marshall's sale. Applicants'

position was to deny the existence of that appraisal as lawful even though in a reorganization proceeding the Judge is permitted to order a sale without any appraisal and without any limitation on the terms or conditions thereto. [The theory being that to save a corporation stringent means might be necessary.] Nevertheless, with obvious regard for the Louisiana provisions the United States District Judge ordered terms in excess of those that may have been required under a Louisiana foreclosure proceeding.

It should also be highlighted that this was not a foreclosure sale ordered by, for, or to the benefit of the creditors, but was a sale to divest the reorganizing Trustee of a financial burden and drain on the assets of the Debtor's estate.

To equate the Marshall's sale in this circumstance with a creditor's foreclosure would be an obvious folly of ignoring the exclusive all-encompassing power, authority and jurisdiction granted to a United States District Court sitting as a corporate reorganization tribunal with exclusive power and authority over the Debtor corporation.

That power and authority is raw, practically unlimited and exclusive and is rarely for the benefit of the creditors, and then only incidentally if it primarily benefits the Debtor's estate.

Applicants in their arguments to the Louisiana Supreme Court urged that the United States District Court should not be permitted to rule on or to govern the provisions of the Louisiana Deficiency Judgment Statute – that power should be exclusively the authority of the Louisiana Court System and the Supreme Court took that argument at face value. [Louisiana Supreme Court Judgment of March 31, 1975,

Applicants.' Brief - Page 7 B]

It was the Louisiana Supreme Court which answered that allegation by stating in their original Judgment that they considered themselves adequate to determine that the United States District Court had *not* violated the provisions of the Deficiency Statute and had concluded correctly.

In so holding they decided after due deliberation that the Deficiency Judgment Statute did not apply to sales under Chapter X in Bankruptcy (Reorganization).

Shortly thereafter, the Associate Justice who had written the opinion, Justice Mack Baham, retired from the Louisiana Supreme Court and the Court granted a rehearing. After due deliberation with another Judge sitting, the Court again upheld the original decision 4 - 3 and Applicants have applied herein for relief.

It is rather unusual that the Applicants would include an argument as to number of judges who have passed on the case as it is not the number of judges but the rank and priority of the last Court. Nevertheless, even that citation of numbers was incorrect. The Bankruptcy Referee sitting as a Special Master was the original party recommending the course of action after two hearings over an 18-month period.

The Federal District Court heard and ordered the sale.

The State District Judge granted Applicants a Motion to Dismiss which was later affirmed by a three-man State Court of Appeals.

Thus, seven Justices of the Louisiana Supreme Court overruled the Court of Appeals 4 - 3, and later granted a

Rehearing. With the original majority opinion writer of the original judgment retired, the Court again ruled 4 - 3 (one extra judge) hence even in the Louisiana Court system five Supreme Court justices have upheld Respondent's position a total of nine times. This is, of course, frivolity and has no standing before any Court.

Applicants' desperation in each of these Courts has created an inconsistent reliance on the United States' and State Court's jurisdictions in an effort to obtain any delay of the final accounting required to live up to the solemn guaranties originally given and so flagrantly violated even from the outset of the loan by honorable, upright attorneys.

First, Applicants as Directors and Officers of the defunct corporation sought relief in the Federal District Court for reorganization to obtain time, ostensibly to put the Debtor corporation on its feet and back into commerce. This, of course, required staying any State Court actions. [The corporation is still in reorganization for these ten years and nothing has been done but a disastrous liquidation providing obscene fees and almost total loss to secured as well as unsecured creditors with the stay order still in effect.]

When this separate suit on the continuing guaranty was filed against these individuals – Applicants not only used the reorganization but other personal suits to attempt to stay or continue the separate State Court action. This was successful for a long time and the State Courts attempted to grant leniency in the hopes that a reorganization might be the successful solution, particularly because of the magnitude of this case, – it was the biggest reorganization that had ever appeared in this Judicial District at the time.

Two years after the separate suit was filed the property

was sold and Applicants again jumped back to the State Court offering that the United States District Court had violated Louisiana Deficiency provisions by the Marshall's sale and that the Louisiana Court should be the determining jurisdiction over sales in Chapter X and the conditions imposed thereon. For the previous four years, they had been screaming that the matter was exclusively Federal jurisdiction.

When the Louisiana Supreme Court determined that the Deficiency Judgment Statute did not control the provisions of a sale under Chapter X, Applicants then changed their plea back and appealed to this Honorable Federal Court.

What should be observed is that the Respondent's action was never a foreclosure suit but was on separate cause of action taken by Respondent years prior to the sale of corporate Debtor's property. Creditors do not control a reorganization proceeding nor do they set the terms for sales ordered thereunder.

> "However, in corporate reorganization under Chapter X, the object is reorganization and recapitalization rather than liquidation, and in accordance therewith, the trustee is vested with the extraordinary power to sell or lease property in any manner which improves the strength of the debtor corporation and protects the creditors. This grant of authority is conferred by 11 U.S.C. # 516, which provides:
>
> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him

> and the court –
>
> ...* * *
>
> (3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, *to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve: * * *.*"

The only limit upon this power is the sound discretion of the judge; 11 U.S.C. #110(f) is specifically made inapplicable by the express wording of 11 U.S.C. #502. See also Judge Augustus Hand's statement in In Re Loewer's Gambrinus Brewery Co., 141 F.2d 747, 750 (2d Cir. 1944): "[Applicant's Brief, Appendix "B", Page 4B]

The United States District Judge sitting as a reorganization Judge has exclusive and extensive powers and discretion to order sales of the Debtor corporation's assets on whatever terms he exclusively concludes and any recommendations by creditors or otherwise only amount to just that – recommendations or suggestions whether the Judge accepts them is completely within his discretion. [11 U.S.C. # 516]

In final conclusion equity and the law both should militate that the delays which have impeded Respondent's lawful pursuit of relief under the separate guaranties executed by these exceptionally capable and knowledgeable attorneys should be at an end and that the purpose of a separate guaranty is for the specific case such as this that the principal co-obligor defaults by applying for bankruptcy relief.

ARGUMENT

This Court is aware of the weight and gravity of the Reorganizational Trustees' responsibility to the United States District Court and the facts indicate the Judge's solemn discretion in requiring an appraisal and that 75% of that amount be a minimum bid.

To hold that a separately commenced suit on a cause of action relating to the separate continuing guaranty should be defeated by a subsequent action of the United States District Judge and his trustee would invite a myriad of litigation over the Judges' exclusive jurisdiction and discretion and weaken the framework of the entire reorganization statute.

The Debtor corporation has indicated its hopelessness in arranging details to maintain its existence without the United States Court staying the State Court actions and to the utter hopeless degree of having to voluntarily surrender its property to the Court appointed Trustee representing the Debtor corporation.

The Louisiana Supreme Court in its Judgment of March 31, 1975 (Appellant's Brief Appendix B-1):

> The essential purpose of the jurisdictional statute . . . "is to render the authority and control of the reorganization tribunal paramount and all embracing to the extent required to achieve the ends contemptated by Chapter X; and to exclude any interference by the acts of others or *by proceedings in other Courts where such activities or proceedings* in other Courts that tend to hinder the progress of reorganization."
> 6 Collier 424 - 3.03 14th Ed 1972

". . .and further in their opinion Appendix 7 B of Applicants' brief in commenting on *Bowl - Opp, Inc. v. Larson*, 334 F Supp 222 (Ed LA 1971) (which also developed out of the same corporate reorganization proceeding as this case but which turned on the fact that there was no appraisal whatsoever required, differing from the instant case which did have an appraisal prior to sale), the Louisiana Supreme Court stated:

> ". . .In the instant case, Louisiana courts are confronted with the issue for the first time, and as we are not bound by the Federal Judge's interpretation of our law, we hold that the act does not apply to Chapter X sales . . ."

The Louisiana Deficiency Judgment Statute was depression legislation enacted to prevent creditors from availing themselves of rapid Louisiana Executive Procedures of obtaining the debtors' property and then obtaining a full Judgment against them.

It applied strictly to foreclosure sales where the creditor took advantage of the waiver of appraisal and confession of judgment provision to obtain debtors' property rapidly without a full trial. Judge Wisdom of the Fifth Circuit commented on the purpose of the Deficiency Statute:

> "The purpose of this Act is to deter a creditor from forcing a mortgagor to waive the benefit of the Louisiana appraisal requirements that at the foreclosure sale the highest bid reached at least two-thirds of the appraised value of the property. *Meadowbrook National Bank v. Massengill* 427 Fed. 1055, p. 1060 (5th Cir. 1970) [Also arising out of this same Reorganization]

The rights to preserve its deficiency amount is accomplished by requiring an appraisal and a minimum bid of 66 2/3% of such appraisal. The entire article is controlled by the condition in which the creditor provokes and controls the legal situation between the parties. [R.S. 13:4106, et seq.]

On the other hand corporate reorganization proceeding provide for immediate voluntary surrender of all of the debtor's property to the Federal appointed Trustee and the Courts exclusive jurisdiction and control thereafter. The basic purpose of the reorganization proceeding is to be able to prevent various state court actions from depleting the assets of the Debtor estate thereby preventing any possibility of a successful rehabilitation.

The Judge's absolute authority and discretion in a reorganization is even more exclusive than in ordinary bankruptcy proceeding as evidenced by 11 U.S.C.# 511 and the reference offered by the Louisiana Supreme Court on its original hearing, (Appendix 7B of Applicants' brief) Applicants claim that Trustee's action was directed by the secured creditor is a fiction which defies both the facts and the law and this Honorable Court's understanding of the power, statutorily resting in the United States District Court sitting as a reorganization tribunal.

Ordinarily, the jealousy existing between State and Federal tribunals militate each seeking an advantage over the other.

In the reverse twist of fate, this case stands for the surprising principle that the highest court of the State of Louisiana on two separate occasions reached the conclusion that the Louisiana Deficiency Judgment Statute should not be

engrafted on the already complex requirements under Chapter X of the Bankruptcy statute. This was an obviously positive attitude to increase the flow of commerce within the state so that foreign investors would not be any more discouraged by the unique nature of Louisiana laws in comparison with those of the other forty-nine states.

From the Federal standpoint to limit reorganization sales in some states and not others would require a multitude of minor procedural differences and would be suggestive of additional litigation impeding the hope of successful reorganization by any secondarily interested party.

This would not lead to the uniformity originally anticipated in the drafting of the Bankruptcy legislation for the equal protection and benefit of all citizens and would certainly lead to shopping for forums in matters that should be uniformly and equally administered in all Federal jurisdictions.

The Louisiana Supreme Court in its original Judgment of March 31, 1975 cited:

> 11 USC # 72 in determining that on June 21, 1967, title to all of Debtor corporation's property passed to the Trustee under 11 USC# 586,
>
> that all sales under straight bankruptcy must comply with 11 USC # 110(f) which requires appointment of appraiser and a price not less thatn 75%,
>
> that in corporate reorganization under Chapter X Trustee is vested with extraordinary power to sell or lease property in any manner which improves the strength of the debtor corporation

and protects the creditors. 11 USC #516.

the only limit on such power is sound discretion as required under 11 USC #502, stating appraisal not necessary.

Yet, in this case the Federal District Judge ordered the more stringent requirements which he was not obligated to do under Chapter X but would have only had to do under straight bankruptcy [which still has not taken place].

These were explained in reference to:

In re Dania Corp. 400 F 2d. 833
(3rd Circuit 1968)

The exclusive nature of the Judge's jurisdiction was cited: 11 USC # 511, and the Court distinguished the question in *Bowl-Opp v. Larson* 334 F. Supp. 22 (Ed LA 1971) from the case at bar in outlining that was a case in which there was no appraisal and the Supreme Court was not bound the interpretation of Louisiana law by the determination of a Federal District Court therein.

The analogous situation between the Louisiana Deficiency Judgment Statute's in-applicability to the Federal Ship Mortgage Act and the Bankruptcy Statute was relied upon in *McDermott v. Vessel MORNING STAR* 431 F 2d 714 heard en banc 457 F 2d 815 5th Circuit 1972).

The Louisiana Supreme Court in a rare Rehearing Judgment filed November 3, 1975 indicated that the present applicants were actually solidary co-debtors along with the

Debtor corporation as evidenced by the Guaranty instrument.

It further stated that the purpose for the Rehearing was not to overturn the previous judgment but to inquire as to a new point brought out by Applicants for the first time on rehearing application. After examination they were satisfied that the matter was not properly or procedurally before the Court and reaffirmed the judgment that the Louisiana Deficiency Judgment Statute was not applicable to sales under Chapter X.

CONCLUSION

For the reasons that this matter is not properly before the Court on the grounds of jurisdiction invoked, i.e., it is not to rule unconstitutional the Louisiana Deficiency Judgment Statute; the lack of a Federal question is admitted by Applicants; if it were Respondent's cause of action would exist more firmly; the unrestricted jurisdiction, authority and discretion of sales under Chapter X rests with the Federal District Judge and are not at the whims or directions of creditors; that any engrafting of various State Court procedures for sales would impair the uniformity of the Bankruptcy Statute and would in the absence of legislation inhibit the legislative intent for the United States District Judge to be absolutely free in his choice of sales and terms of Debtor's property in reorganization proceedings; and that the separate suit on a continuing guaranty of a solidary co-debtor, commenced one year prior to sale in the reorganization tribunal should not be invalidated by a subsequent sale ordered in the Court's sole and exclusive discretion for the primary purpose of relieving the Debtor's estate of a non-productive burden.

For these reasons and Applicants' often-mentioned acknowledgment that there is no Federal question present, and that it would impede the national interest for there to be a separate procedure for sales in each Bankruptcy jurisdiction, Respondent submits that Applicants' application for Writ of Certiorari should be denied and refused.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the above and foregoing has been served upon Applicants by mailing a copy of same to its attorneys of record, C. Ellis Henican, Jr. and Carl W. Cleveland, of the firm of Henican, James & Cleveland, through the U. S. Mail, postage prepaid, and addressed to them at Suite 4440 - One Shell Square, New Orleans, La., 70139, this 3rd day of March, 1976.

_____
C LEO S. ROOS

APPENDIX "A"

"Continuing Guaranty . . .

"IN CONSIDERATION of the National American Bank of New Orleans, at my request giving or extending terms of credit to

PLACE VENDOME CORPORATION

hereinafter called debtor, I hereby give this continuing guaranty to the said National American Bank of New Orleans, New Orleans, La., hereinafter referred to as the Bank, its transferees or assigns, for the payment in full together with interest, fees and charges of whatsoever nature and kind, of any indebtedness, direct or contingent of said debtor to Bank, up to the amount of ($1,824,234.00) ONE MILLION EIGHT HUNDRED TWENTY-FOUR THOUSAND, TWO HUNDRED THIRTY-FOUR & NO/100 DOLLARS; whether due or to become due, and whether now existing or hereafter arising; I hereby bind and obligate myself, my heirs and assigns, in solido with said debtor, for the payment of said indebtedness precisely as if the same had been contracted and was due or owing by me in person, hereby agreeing to and binding myself, my heirs and assigns, by all the terms and conditions contained in any note or notes signed or to be signed by said debtor, making myself a party thereto; and, waiving all notice, including notice of demand, dishonor, or protest, and all pleas of discussion and division, I agree to pay upon demand at any time to said Bank, its transferees or assigns, the full amount of said indebtedness up to the amount of this guaranty, together with interest, fees and charges, as above set forth, becoming subrogated in the event of payment in full by me to the claim of said Bank, its transferees or assigns, together with whatever security it or

they may hold against said indebtedness. The Bank may extend any obligation of the debtor one or more times, and may surrender any securities held by it without notice, or consent from me, and I shall remain at all times bound hereby, notwithstanding such extensions, and/or surrender.

"This guaranty shall continue in full force and effect and shall be terminated only upon receipt by the Bank of written notice of revocation from me, or upon receipt of notice of my death, and that, in either of said events, my liability hereon shall continue as to obligations then existing, and as to any and all renewals or extensions thereof made after said event or events.

"IT IS EXPRESSLY AGREED that this continuing guaranty is absolute and complete, and that acceptance and notice of acceptance thereof by the Bank are therefore unnecessary and they are hereby expressly waived." (Emphasis provided) (Executed February 21, 1966.)

APPENDIX "B"

Respondent accepts and incorporated to this Brief by reference hereto and in toto the Appendices "B" and following – Pages 1B through 40B, inclusive, of Applicants' brief.